Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

KENNEDY NIJMEH,

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under 18 U.S.C. § 3553(b) and the United States Sentencing Guidelines, may an upward departure be based on "related" alleged criminal conduct, of which the defendant was acquitted at trial, and which is outside the Commission's definition of "relevant conduct"?

2. To justify an upward departure under the United States Sentencing Guidelines for alleged criminal conduct of which the defendant has not been convicted, must the government meet a burden of proof by at least "clear and convincing evidence" if the resulting sentence increase is some three years' imprisonment -- doubling the guideline range and reaching the statutory maximum for the only count of conviction?

3. Does the filing of a false schedule of assets in bankruptcy constitute a "violation of any judicial or administrative order, injunction, decree or process" within the meaning of USSG § 2F1.1(b)(4)(B), as held by the court below, or is this two-level increase inapplicable, as held by several other circuits?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Kennedy Nijmeh and the United States). Four co-defendants named in the indictment or superseding indictments pleaded guilty; none was a co-appellant below, and none is party to this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNEDY NIJMEH respectfully petitions this Court for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit filed and entered on January 14, 2000.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit (per Kleinfeld, J., with Browning & Rymer, JJ.) was filed on January 14, 2000), is not published, although the text is available at 2000 WL 32064. It is noted at 210 F.3d 387 (table), and is reprinted as Appendix A. The district court (Ware, J., N.D.Cal.) wrote no opinion, but its reasons for the sentence challenged in this petition are part of the Judgment, filed Oct. 23, 1998; all pertinent portions of the judgment are reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the petitioner's conviction and sentence was filed and entered on January 14, 2000. Appendix A. A timely petition for rehearing and for rehearing in banc was denied by Order filed February 25, 2000. Appendix C. This petition is timely filed within 90 days of the latter date. Rule 13.1; 28 U.S.C. § 2101(c). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTE AND SENTENCING GUIDELINE INVOLVED

The Sentencing Reform Act provides, in pertinent part:

> **§ 3553. Imposition of a sentence**
>
> **(a) Factors to be considered in imposing a sentence.**-- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) if this subsection. The court, in determining the particular sentence to be imposed, shall consider --
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed --
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; ...

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, and that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct;

* * * *

(b) Application of guidelines in imposing a sentence.-- The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into

consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. ....

* * * *

18 U.S.C. § 3553.

The United States Sentencing Guidelines provide, in pertinent part:

§2F1.1. Fraud and Deceit; Forgery; ....

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

* * * *

(4) If the offense involved ...

(B) violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines, increase by **2** levels. If the resulting offense level is less than level **10**, increase to level **10**.

* * * *

Commentary

* * * *

Application Notes

* * * *

11. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure

may be warranted. Examples may include the following:

* * * *

(b) false statements were made for the purpose of facilitating some other crime;

* * * *

* * * *

STATEMENT OF THE CASE

This petition presents important questions concerning the application of federal sentencing law. Petitioner was tried for drug trafficking and bankruptcy fraud. The jury acquitted him of all drug and money laundering charges, but convicted him on the fraud count. The district court departed upward to the statutory maximum, doubling the guideline sentence, based on the acquitted conduct.

a. Procedural History

In a second superseding indictment filed October 7, 1997, a federal grand jury in the Northern District of California charged petitioner Kennedy Nijmeh and two other individuals in seven counts with conspiracies to possess and import cocaine, 21 U.S.C. §§ 846, 963; money laundering, 18 U.S.C. § 1956(a) (two counts); criminal forfeiture; and bankruptcy fraud (false oath), 18 U.S.C. § 152(2) (count seven). (The original indictment, filed November 5, 1996, had named one of these co-defendants and two others, not including petitioner.[1])

[1] After certain defendants began to "cooperate" with the government, petitioner Nijmeh was named on June 24, 1997, as a co-defendant in a first superseding indictment in two

Count Seven charged specifically that in September 1996 petitioner filed a voluntary Chapter 7 bankruptcy in which he falsely declared personal assets of only $500, when in fact, according to the indictment, he possessed assets "in excess of $100,000." The debts to be discharged by that petition totaled $156,107.

After a month-long trial (16 days of testimony and proceedings), the jury acquitted petitioner of all the drug-related and money laundering charges, but convicted him on the one count of bankruptcy fraud. At trial, the defense verdict on the drug charges resulted from a thorough, detailed, and documented discrediting of the "cooperating" informant witnesses.

On October 21, 1998, the district court sentenced petitioner to serve 60 months' imprisonment, the statutory maximum for the one count of conviction. Appx. B. On January 28, 1999, the court granted bail pending appeal. Petitioner has since surrendered for service of his sentence, however.

b. Statement of Facts

On September 26, 1996, petitioner Nijmeh filed a counseled, voluntary Chapter 7 bankruptcy petition in which he declared personal assets of only $500 and swore that he owned no household furnishings or automobiles. He sought to discharge over $150,000 in judgments and personal debt resulting from the failure of a nightclub venture. In late December 1996, the Bankruptcy Court granted him a discharge of debts totaling $156,107.

At trial, the government sought to prove that petitioner had an undeclared, one-fourth ownership interest

_____(cont'd)

counts: conspiracy to possess cocaine and conspiracy to import cocaine.

in a sports car he shared with his brothers, another car that was titled to his girlfriend, and possessed a leasehold interest in a $1500 per month, two-bedroom apartment. Petitioner testified at trial that he had not recognized that any of these three items of property should be declared in the bankruptcy petition, and that he had not intended to defraud anyone. In the course of its attempt to prove the drug charges, the government also presented testimony tending to show very substantial cash income. However, the jury apparently disbelieved that evidence, as it acquitted petitioner on all of the cocaine and money laundering counts.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii)

The United States District Court for the Northern District of California had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed there. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. §§ 3742(a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below misconstrues and misapplies this Court's 1997 *per curiam* decision in Watts to justify an upward departure sentence that flatly violates the statutory criteria for departures. Whether a standard of "clear and convincing evidence," rather than a mere preponderance standard, applies to the proof of circumstances leading to an upward departure that doubles a guideline sentence could be outcome-determinative in this case. There is a deeply entrenched Circuit split over upward departures grounded on non-conviction criminal conduct of a kind which the Commission deems not to be "relevant" to sentencing.

One of the "key compromises" built into the federal guideline sentencing system under the Sentencing Reform Act is the "modified conviction offense" principle, under which the applicable guideline is determined by the offense of cōnviction and then certain "real offense" elements are considered in choosing the appropriate sentence -- but only when, how, and to the extent that the Commission has provided. See USSG ch.1.A., ¶4(a) (p.s.); Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L.Rev. 1, 8-12 (1988). As the current edition of a leading treatise notes, the circuits are "fairly sharply divided about whether an upward departure may be based on acquitted, dismissed, or uncharged conduct that is related to the offense of conviction, but is not relevant conduct taken into account by the applicable offense guideline." Thomas W. Hutchison, David Yellen, Peter B. Hoffman & Deborah Young, *Federal Sentencing*

Law and Practice 1482 (2000 ed.).[2] Certiorari should be granted to address that fundamental issue, and an underlying standard-of-proof issue, which go to the core of the current federal sentencing system.

a. *The departure for "related" (acquitted) conduct*

Petitioner Nijmeh was acquitted of all the drug-related and money laundering charges at trial, but he was convicted on one count of bankruptcy fraud. The district court departed upward at sentencing to the statutory maximum of 60 months (five years's imprisonment) on that conviction, even though the guidelines called for a sentence of no more than 30 to 36 months. In the face of petitioner's challenge on appeal, the court below sought to justify the departure in the following terms:

> "[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[4] The trial judge had very strong evidence before him of Nijmeh's involvement in the drug conspiracy ....

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4. United States v. Watts, 519 U.S. 148, 157 (1997). This departure was not a dramatic increase. United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999), and even if it were, the trial judge expressly found "clear and convincing" evidence.

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[2] "Relevant conduct" under the guidelines is a term of art elaborated and defined in USSG § 1B1.3. See generally Edwards v. United States, 523 U.S. 511, 514 (1998); Witte v. United States, 515 U.S. 389, 402-03 (1995); Kate Stith & Jose

Appx. A2-A3. This Court should review this total misapplication of the Court's decision in Watts.

The decision of the court below on the departure issue does not endorse either of the rationales offered by the sentencing court for its doubling of petitioner's sentence to the statutory maximum.[3] Both of the reasons given by the district court for the departure were predicated on his disagreement with the jury's verdict: first, the court suggested that it was dissatisfied with the guideline level for the offense, and second, it asserted that the bankruptcy fraud was somehow aggravated by drug-related conduct. The court relied not on the guidelines' "relevant conduct" provision, USSG § 1B1.3, under which a belief that petitioner did commit the crimes for which he was acquitted would have no bearing on his fraud sentence, but rather on a theory of "related conduct" to increase the sentence via departure.

The first rationale was expressed as follows:

> The Court finds that the Guideline range does not adequately reflect the seriousness of the defendant's behavior. ... Accordingly, the Court departs upwardly to a sentence of 60 months .... The Court chooses 60 months because it is the statutory maximum sentence for the offense of

_____(cont'd)

A. Cabranes, *Fear of Judging* 70 (1998) ("the 'principle' of 'relevant conduct' is unknown outside of the federal Sentencing Guidelines.").

[3] Petitioner makes a separate issue under Point 1.c. below of the court of appeals' declaration that a doubling of the sentence to the statutory maximum, adding three years in prison, did not represent a "dramatic increase" in the sentence.

> conviction. The [C]ourt finds that the conduct and character of the defendant and the circumstances of the commission of the offense of conviction deserves [sic] the highest punishment allowable by law for the offense of conviction.

Appx. B4. This articulated basis for the upward departure was nothing but an undisguised rejection of and disagreement with the guidelines system itself. No district judge is authorized to depart upward on the broad, subjective basis "that the conduct and character of the defendant and the circumstances of the commission of the offense of conviction [merit] the highest punishment allowable by law for the offense of conviction." See United States v. Ruffin, 997 F.2d 343, 344 (7th Cir. 1993) (Easterbrook, J.: "the Guidelines are bound to leave many judges believing that they have been instructed to impose unjust sentences. Still, disagreement with the law does not justify undermining it.").

The government did not even attempt to defend this rationale on appeal, nor did the court below deign to mention it. The sentencing court's second rationale was as follows:

> The Court finds ... that the offense of conviction was committed in an effort to conceal proceeds derived by the defendant from major drug trafficking activities carried on by him. [A]t times relevant to the bankruptcy petition, the defendant had substantial money and property derived from drug trafficking activities, which could [sic] have disqualified him as a person who was insolvent or as one incapable of paying

> his debts as they became due and that the petition was filed to conceal those proceeds and to further the defendant's drug trafficking. Accordingly, the Court departs upwardly to a sentence of 60 months, pursuant to USSG sections 2F1.1 and 5[K]2.0 [(p.s.)].

Appx. B4.[4] The district court's reference to "section 2F1.1" was apparently directed at Application Note 11(b), which had been invoked and discussed by the parties.[5] That passage of commentary suggests that an upward departure in a fraud case may be warranted where "false statements were made for the purpose of facilitating some other crime." See Statute and Guideline Involved, p.5 ante.

On appeal, petitioner argued that the finding that he filed under Chapter 7 and then willfully understated his assets "in an effort to conceal proceeds derived by the defendant from major drug trafficking activities carried on by him" was nonsensical and unsupported, even if "concealment" could constitute "facilitation," which is the Note's standard. Subjecting his finances to scrutiny by his creditors, by the bankruptcy court, and by the U.S. Trustee by filing for bankruptcy would hardly advance a drug business, nor could filing false statements of assets serve to "conceal" drug proceeds better than not filing any public statements on the subject at all. Apparently unable to refute this simple logic, the court below did not

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[4] This quotation excises references to the articulated standard of proof, which is discussed separately under Point 1.c. below.

[5] This Application Note was formerly renumbered 10(b), but the renumbered involved no re-writing.

address Application Note 11(b) or endorse this part of the district court's rationale any more than it did the lower court's disapproval of the proper guideline range.

Instead, as set forth above, the Ninth Circuit relied exclusively on this Court's decision in Watts, quoting the part of the decision which states that an "acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam). See Appx. A2. This completely misses the point, as Watts stands for the proposition that conduct underlying an acquittal may nevertheless be considered, if reliably proven for sentencing purposes, to establish a proposition that the guidelines make pertinent, such as "relevant conduct." The use of acquitted conduct for an upward departure, however, is not supported by the rationale of Watts at all; it presents an entirely different situation under the Sentencing Reform Act and guidelines. Here, petitioner's alleged drug trafficking is not "relevant" under USSG § 1B1.3 in a fraud case. Thus, without any real explanation or justification, the court below affirmed the sentence on the controversial and improper basis of "related" conduct.

The Circuits are divided on the question whether conduct that does not qualify under the guidelines as "relevant conduct" may nevertheless form the basis for an upward departure. This Court should grant certiorari to clarify the controlling principles of law governing this important aspect of federal sentencing.

The court of appeals' sentencing theory -- allowing an upward departure to be predicated on other criminal conduct which is said to be "related" to the offense of

convicted even though not "relevant" under the guidelines -- has previously been adopted by several circuits, following Judge Newman's leading decision in United States v. Kim, 896 F.2d 678 (2d Cir. 1990)[6]. See also United States v. Barber, 119 F.3d 276, 284 (4th Cir.) (in banc), cert. denied, 522 U.S. 988 (1997); United States v. Baird, 109 F.3d 856, 862-67 (3d Cir.), cert. denied, 522 U.S. 898 (1997); United States v. Zamarripa, 905 F.2d 337, 341-42 (10th Cir. 1990).[7] That rationale cannot be reconciled with the controlling statute, however.

The Sentencing Reform Act plainly states that departures are permissible only on grounds "not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Sentencing Commission's manual reminds district courts of this most important limitation. USSG § 5K2.0 (p.s.). This Court has recognized and elaborated it as well. See Koon v. United States, 518 U.S. 81 (1996). If any subject was "adequately taken into

[6] Kim was followed in such cases as United States v. Tropiano, 50 F.3d 157, 164 (2d Cir. 1995), and United States v. Thai, 29 F.3d 785, 820 (2d Cir. 1994).

[7] Other courts have noted that unconvicted criminal conduct may warrant a conclusion that the defendant's criminal history category underrepresents his or her danger to the community or risk of recidivism. E.g., United States v. Ashburn, 38 F.3d 803 (5th Cir. 1994) (in banc); United States v. Ruffin, 997 F.2d 343 (7th Cir. 1993); United States v. Figaro, 935 F.2d 4 (1st Cir. 1991). Although the courts in those cases have sometimes cited Kim as authority, their rationale is really entirely different. Such departures are expressly authorized by USSG § 4A1.3 (p.s.) and are not at issue in this case.

consideration" by the Commission, surely it was the issue of "real offense" versus conviction offense sentencing, as elaborately set forth in application instructions, USSG §§ 1B1.1-1B1.2, in the "relevant conduct" guideline, USSG § 1B1.3, and to a lesser extent in several other provisions of the manual. Thus, as the Hutchison and Yellen treatise states:

> To allow such departures seems to run afoul of the guidelines' compromise between real offense and charge offense sentencing. The rationale for departing based on conduct of which the defendant has not been convicted would seem to be that this conduct constitutes an aggravating circumstance of the offense of conviction. However, the guidelines either require or forbid consideration of related criminal conduct [u]nder the relevant conduct guideline (§ 1B1.3) .... A court cannot depart based on such conduct, because it is already taken into consideration by the guidelines.

Hutchison & Yellen, supra, at 1482.[8] Thus, unless petitioner's alleged drug trafficking conduct, of which he stood entirely acquitted, was specifically allowable as a ground of departure under USSG § 2F1.1 (which the

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[8] Certain other cases, which reject upward departures predicated on "related conduct" in dismissed counts, turn entirely on the relationship between the guidelines and the plea bargaining system. See, e.g., United States v. Lawton, 193 F.3d 1087 (9th Cir. 1999); United States v. Harris, 70 F.3d 1001 (8th Cir. 1995). Petitioner's case went to trial; no plea bargaining issue exists here.

district court found, but the court of appeals ignored), then the decision below deviated intolerably from the controlling statute and misapplied this Court's decisions.

Certiorari should be granted to correct the lower courts' adherence to the lawless "related conduct" theory of upward departures.

b. *The decision below violates this Court's Williams precedent by affirming on different grounds.*

By affirming on a rationale different from that articulated by the sentencing court, the court below also violated the standard of review, and arrogated power to itself that the statutes deny. The decision thus ran afoul of the binding precedent set in Williams v. United States, 503 U.S. 193 (1992). As this Court explained in Williams:

> When a district court has intended to depart from the guideline range, a sentence is imposed 'as a result of' a misapplication of the Guidelines[, 18 U.S.C. § 3742(f)(1),] if the sentence would have been different but for the district court's error. Accordingly, in determining whether a remand is required under § 3742(f)(1), a court of appeals must decide whether the district court would have imposed the same sentence had it not relied upon the invalid factor or factors.

503 U.S. at 203. The burden of persuasion on this point was the government's, not the appellant's:

> [T]he party challenging the sentence on appeal, although it bears the initial burden

> of showing that the district court relied upon an invalid factor at sentencing, does not have the additional burden of proving that the invalid factor was determinative in the sentencing decision. Rather, once the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed.

Id. It is "the party defending the sentence" that must "persuade[] the court of appeals" on this point. Id. The issue is not what the lower court "could have" done, but what decision it "would have" made. Id. at 204-05. The court below utterly failed to make any such analysis. Accordingly, even if the upward departure was not legally erroneous, the court of appeals was bound to remand, not to affirm. See United States v. Barber, 119 F.3d at 285-86 (Wilkins, J.). If certiorari is granted, this error, too, must be corrected.

c. *Articulating and applying at least a "clear and convincing" burden of proof to facts determining substantial upward departures should have produced a different result.*

This Court has twice noted the existence of a significant, unresolved issue concerning the burden of proof for nonconviction facts which generate a substantial increase in a sentence under the guidelines. See Almendarez-Torres v. United States, 523 U.S. 224, 247-

48 (1998); United States v. Watts, 519 U.S. 148, 156-57 & n.2 (1997) (per curiam). This case presents that issue in the context of an upward departure which doubled the length of the sentence, increasing it by some three years' incarceration, all the way to the statutory maximum for the single count of conviction. Certiorari should now be granted to consider the applicable standard of proof.

As discussed in the previous sections of this petition, the only theoretically legitimate rationale for departure in this case is the question whether petitioner made "false statements" on his bankruptcy petition "for the purpose of facilitating some other crime." USSG § 2F1.1, appl. note 11(b) (p.s.). In its stated rationale, the sentencing court wrote:

> The Court finds by a preponderance of the evidence that the offense of conviction was committed in an effort to conceal proceeds derived by the defendant from major drug trafficking activities carried on by him. Although the Court does not believe that it is necessary to base its finding on a higher standard of proof, the Court finds by clear and convincing evidence that at times relevant to the bankruptcy petition, the defendant had substantial money and property derived from drug trafficking activities, which could [sic; would?] have disqualified him as a person who was insolvent or as one incapable of paying his debts as they became due and that the petition was filed to conceal those proceeds and to further the defendant's drug trafficking. Accordingly, the Court departs

> upwardly .... The Court chooses 60 months because it is the statutory maximum ....

Appx. B4.

On appeal, petitioner argued that these findings did not provide a logical basis for a departure under Application Note 11(b). The Ninth Circuit responded:

> "[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[4] The trial judge had very strong evidence before him of Nijmeh's involvement in the drug conspiracy, including the fact that customs officers found receipts on Nijmeh for materials used to make the tables in which the cocaine was found and that he made false statements to customs inspectors.
>
> ---
>
> 4. United States v. Watts, 519 U.S. 148, 157 (1997). This departure was not a dramatic increase. United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999), and even if it were, the trial judge expressly found "clear and convincing" evidence.

Appx. A2-A3. First, the precise factual question must be identified, something the court of appeals failed to do. The issue for departure was not "Nijmeh's involvement in the drug conspiracy," but rather whether a false statement of assets was filed in bankruptcy court "for the purpose of facilitating" that other offense. The proof of this, if any existed at all, was slight. Given the

devastating and utterly persuasive demonstration at trial of the government witnesses' prevarications (including proof that the witnesses had "cloned" cell phones to make it appear that calls from one person's phone had actually been made by someone else), the trial evidence could not have rightly been said to satisfy a "clear and convincing" standard, even if it could meet a "preponderance" test, much less the "reasonable doubt" test that ought to be applied if the defendant is to be treated as if convicted of an entirely separate offense. See United States v. Kikumura, 918 F.2d 1084, 1100-01 (3d Cir. 1990) (Becker, J.).

The district court's casual recitation -- relied upon in the court below -- that its findings could, hypothetically and in the alternative, be reiterated on the higher standard, is utterly unconvincing. Likewise, its comment that there was no "dramatic increase" increase here within the meaning of Watts, 519 U.S. at 156 ("whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence"), is highly dubious and worthy of thoughtful examination of how that line is to be drawn. Because this case could be resolved differently on the two standards of proof, certiorari should be granted to address the issue reserved in Watts and Almendarez-Torres.

2. If this Court agrees to consider the validity of the upward departure, it should also review and correct the Ninth Circuit's blatant misapplication of USSG § 2F1.1(b)(4)(B); omitting assets from a bankruptcy petition is simply not a "violation" of "judicial process." There is a deep Circuit split over the construction and application of this guideline provision.

The Circuits are divided on the question whether a sentencing court should add two levels to the guideline calculation in a fraud case under what is now USSG § 2F1.1(b)(4)(B) (formerly (b)(3)(B)) for "violation of any judicial or administrative order, injunction, decree or process," simply because the offense was bankruptcy fraud. The weight of the case law supports the decision below, but the more recent and better-reasoned authority is to the contrary. See United States v. Rowe, 202 F.3d 37, 42-43 (1st Cir. 2000) (Rowe II) (upholding enhancement on basis of violation of specific order); United States v. Thayer, 201 F.3d 214, 226-28 (3d Cir. 1999), cert. filed on other grounds, No. 99-1785 (May 8, 2000).

Bowing to binding Ninth Circuit precedent, the defense did not object to this adjustment prior to sentencing or on appeal. See United States v. Kubick, 205 F.3d 1117 (9th Cir. 1999); United States v. Welch, 103 F.3d 906 (9th Cir. 1996). Nevertheless, the error is plain under the language and structure of the guidelines. Fed.R.Crim.P. 52(b). As noted, the district court enhanced petitioner's guideline computation by two levels under USSG § 2F1.1(b)(4)(B), for "violation of" a "judicial ... order ... or process." It was never suggested that petitioner violated any "judicial order." Rather, the PSI, adopted by the district court (Appx. B3), stated

simply that "Bankruptcy proceedings are a matter of judicial process; thus, the defendant violated the judicial process when he lied about his assets in the bankruptcy petition." PSI ¶27, at 8.

Subsection (b)(4)(B) is a "specific offense characteristic" under the general fraud guideline, USSG § 2F1.1, which provides:

> (4) If the offense involved ... (B) violation of any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

As shown by the Commentary, this guideline was intended to apply only when there had been a "prior proceeding" (§ 2F1.1, appl. note 5) initiated because the defendant was accused of "the same or similar fraudulent conduct" (§ 2F1.1, comment., bkgrnd., unnumbered ¶4), and the criminal case has resulted from a repetition of that conduct notwithstanding the prior order to desist. Here, there was no "prior proceeding" as a result of which Mr. Nijmeh was directed by any court or administrative agency to refrain from filing a false bankruptcy petition or otherwise from underreporting his assets, or from any similar fraudulent conduct. No evidence was offered, and there is nothing in the PSI to show, that petitioner was subject to any such directive. United States v. Shadduck, 112 F.3d 523, 528-30 (1st Cir. 1997). For this reason, the enhancement does not apply.

In accord with the plain language of the guideline and commentary, the better reasoned opinions addressing the meaning of the phrase "violation of any judicial or administrative order, injunction, decree, or process" in

§ 2F1.1(b)(4)(B) hold that where, as here, no specific order or decree directed at the defendant was violated, and the defendant's only "violation" was the commission of the offense itself upon which the base offense level was calculated, application of this enhancement is improper.

The First Circuit reversed a sentence that was based on a (b)(4)(B) enhancement for this reason. In United States v. Shadduck, the sentencing court had imposed the increase because the debtor-defendant "repeatedly flout[ed] the obvious intendment behind the Bankruptcy Rules and Official Forms that all property of the debtor be disclosed." 112 F.3d at 528. In the absence of any "pertinent order, decree or injunction ever entered prior to the bankruptcy fraud perpetrated by Shadduck," id. at 529, however, the court of appeals reversed.[9] See also United States v. Carrozzella, 105 F.3d 796, 799-802 (2d Cir. 1997) (mail fraud conviction where an attorney filed false accounts with the probate court); United States v. Michalek, 54 F.3d 325, 335-36 (7th Cir. 1995) (Ferguson, J., 9th Cir., dissenting in pertinent part).

Several circuits have relied on a fallacious and overly broad interpretation of the word "process" in § 2F1.1(b)(4)(B), as though it meant "system," and a substitution of the concept of "abuse of the process" for the guideline's phrase "violation of judicial ... process." See United States v. Guthrie, 144 F.3d 1006, 1010 (6th Cir. 1998); United States v. Saacks, 131 F.3d 540, 546

[9] In United States v. Rowe, 144 F.3d 15 (1st Cir. 1998) (Rowe I), the court acknowledged Shadduck but stated that it was not deciding whether the enhancement is appropriate in all bankruptcy concealment cases. Id. at 23 n. 3; see also Rowe II, supra.

(5th Cir. 1997); United States v. Michalek, 54 F.3d 325, 330-33 (7th Cir. 1995); United States v. Lloyd, 947 F.2d 339 (8th Cir. 1991) (per curiam). The loose definitions applied in those cases would require "process" to be used in a sense that is out of sync with the rest of the terms in the phrase "order, injunction, decree, or process," all of which refer to specific directives to individual defendants, in violation of the principle of ejusdem generis. Rather, the context plainly shows that the term "process" is used in subsection (b)(4)(B) in the same sense in which it appears in the phrase "service of process." See Carrozzella, 105 F.3d at 799-800; Michalek, 54 F.3d at 335 (Ferguson, J.).

The use of the enhancement here "derogated the very structure of the Sentencing Guidelines, whereby the core crime corresponds to the base offense level and the enhancements correspond to the particular facts of the crime as it was committed by the defendant." Michalek, 54 F.3d at 336 (separate opinion); Carrozzella, 105 F.3d at 799-800. See also United States v. Shadduck, 112 F.3d at 531 (declining to address issue, describing it as "not free from doubt"); United States v. Bellew, 35 F.3d 518 (11th Cir. 1994) (per curiam) (declining to adopt flawed construction of "process" announced in Lloyd).[10]

The commentary to the guideline section strongly supports this reasoning. The "background" commentary states:

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[10] The holding of Bellew, however, is equally unpersuasive as Lloyd's and its progeny, insofar as it approved a (b)(4)(B) enhancement in a bankruptcy concealment case based on the debtor's fraudulent omission of valuable assets from the required schedules. The Bankruptcy Rules, which call for the disclosure of assets, cannot themselves qualify as "judicial orders." Shadduck, supra.

> A defendant who has been subject to civil or administrative proceedings for the same or similar fraudulent conduct demonstrates aggravated criminal intent and is deserving of additional punishment for not conforming with the requirements of judicial process or orders issued by federal, state, or local administrative agencies.

USSG § 2F1.1, comment., bkgrnd., unnumbered ¶4 (p.s.). Nothing of the sort exists here, and petitioner thus did not "demonstrat[e] aggravated criminal intent" over the ordinary fraud case. The Commission's commentary is an authoritative guide to the guideline's meaning. Stinson v. United States, 508 U.S. 36 (1993). The imposition of the two-level enhancement was a misapplication of USSG § 2F1.1(b)(3)(B). Shadduck, supra.

Even if there were ambiguity in the Commission's use of the terms "order" and "process," that ambiguity would have to be resolved in favor of the defendant under the rule of lenity. See United States v. Granderson, 511 U.S. 39, 54 (1994); United States v. R.L.C., 503 U.S. 291, 305-06 (1992); Bifulco v. United States, 447 U.S. 381, 387 (1980) (rule of lenity applied to construction of sentencing statutes) ; United States v. Bazile, 209 F.3d 1205 (10th Cir. 2000) (rule of lenity applies to construction of guidelines); United States v. Cheape, 889 F.2d 477, 480 n.8 (3d Cir. 1989) (Becker, J.; same); cf. 18 U.S.C. § 3553(a) (sentence must be "no greater than necessary"). In this case, the district court improperly applied the guideline broadly, not strictly, and the court of appeals affirmed.

While recognizing that this Court does not generally sit to correct misapplications of the guidelines, even

where there is a conflict in the Circuits, see Braxton v. United States, 500 U.S. 344, 347-48 (1991), petitioner suggests that there are special reasons to do so here. The Sentencing Commission has recognized dozens of conflicts in the circuits concerning the meaning of various guidelines, but has acted to resolve only a few. The conflict at issue here has existed without remedy for some nine years. The Court should therefore consider temporarily relaxing its Braxton policy in selected, important cases. Particularly if the Court grants this petition for the first reason given above, it should also accept the "judicial process" issue for resolution.

For this reason as well, the Court should grant this petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, petitioner KENNEDY NIJMEH prays that this Court grant his petition for a writ of certiorari to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit affirming the judgment of sentence.

Respectfully submitted,

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APPENDIX A

210 F.3d 387 (Table)
Unpublished Disposition
2000 WL 32064 (9th Cir.(Cal.))

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 98-10477

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

KENNEDY NIJMEH, Defendant-Appellant.

Argued and Submitted Dec. 9, 1999
San Francisco, California
Decided Jan. 14, 2000.

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding
(D.C. No. CR-96-20155-5-JW)

BEFORE: BROWNING, RYMER, and KLEINFELD, Circuit Judges.

MEMORANDUM[1]

**1 Nijmeh argues that the district court erred by denying severance of the bankruptcy and cocaine

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

offenses. Even if we were to assume that there were a misjoinder, we can reverse only if a misjoinder resulted in "actual prejudice" to the defendant.[2] Nijmeh suffered no prejudice here from the refusal to sever, because there was overwhelming evidence to support his conviction, the trial judge admonished the jury to consider separately each offense charged, and most of the evidence would have come in on the bankruptcy case anyway.

Nijmeh argues that his counsel provided ineffective assistance by failing to argue the defense that his client's false statements were not material to the bankruptcy fraud. We decline to depart from our general rule of refusing to review ineffective assistance claims on direct appeal.[3]

Nijmeh argues that the district court abused its discretion by departing upward to a sixty-month sentence because of Nijmeh's involvement in the drug conspiracy. "[A] jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence."[4] The trial judge had very strong evidence before him of Nijmeh's involve-

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[2] See United States v. Lane, 474 U.S. 438, 449 (1986).

[3] See United States v. Quintero-Barraza, 78 F.3d 1344, 1347 (9th Cir. 1995) (quoting United States v. Molina, 934 F.2d 1440, 1446 (9th Cir. 1991)).

[4] United States v. Watts, 519 U.S. 148, 157 (1997). This departure was not a dramatic increase. United States v. Hopper, 177 F.3d 824, 833 (9th Cir. 1999), and even if it were, the trial judge expressly found "clear and convincing" evidence.

ment in the drug conspiracy, including the fact that customs officers found receipts on Nijmeh for materials used to make the tables in which the cocaine was found and that he made false statements to customs inspectors.

Nijmeh also argues that the district court erred by requiring $156,107.46 (the amount of the debts discharged in bankruptcy) in restitution. But the trial judge had evidence before him that Nijmeh had gotten at least $1.3 million from his illegal drug activities, had bought expensive cars, furniture, and clothes, had traveled internationally, and had gambled substantial sums. The trial judge did not clearly err in concluding that Nijmeh had concealed far more money than the $156,107.46 in debts he was trying to get rid of in bankruptcy and that the actual or intended loss should therefore be the value of the debtor's liabilities.[5]

Nijmeh argues that the district court erred in adding a two-level enhancement for obstruction of justice. Nijmeh's testified that "[i]t didn't seem like I was trying to deceive anybody," responded "that was not my intention" to whether he had filed the false bankruptcy petition to get the creditors off his back, and replied, "no, not actually" when asked if he was misstating his assets to defraud the bankruptcy court. The district court was not clearly erroneous in determining that Nijmeh obstructed justice by perjuring himself and made the appropriate findings to support this determination.

Nijmeh finally argues that the multiple victim adjustment was inappropriate because expert testimony showed that, even if the assets had been fully disclosed,

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[5] See United Sates v. Dolan, 120 F.3d 856, 870 (8th Cir. 1996).

the actual loss to all the creditors was zero because the debt was fully dischargeable. The record fully supports the trial court's adjustment. All of Nijmeh's $156,107.46 in debts was discharged in the fraudulent bankruptcy, and these debts were held by numerous creditors (about 20). A multiple victim adjustment was appropriate because the creditors and the trustee were victims of his fraud.[6] The district judge reasonably concluded that Nijmeh was hiding more than enough assets so that the creditors could have been paid.

**2 AFFIRMED.

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[6] United States v. Nazifpour, 944 F.2d 472, 474 (9th Cir. 1991).

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of California

United States of America
v.
KENNEDY NIJMEH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 5:96CR20155-005
WILLIAM L. OSTERHOUDT ESQ
Defendant's Attorney

THE DEFENDANT:

___ pleaded guilty to count(s) _____
___ pleaded nolo contendere to count(s) _____
which was accepted by the court
_X_ was found guilty on count(s) SEVEN(7) [sic] OF THE SECOND SUPERCEDING [sic] INDICTMENT after a plea of not guilty.

Title & Section	Nature of Offense
18 U.S.C. '[sic] 152	Bankruptcy Fraud

Date Offense Concluded	Count Number(s)
09/16/1996	7

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

_X_ The defendant has been found not guilty on count(s) **1,2,4,5 and 6 of the second superceding [sic] indictment**

* * *

10/21/98
Date of Imposition of Judgment

s/James Ware

Signature of Judicial Officer

JAMES WARE

UNITED STATES DISTRICT JUDGE

Name & Title of Judicial Officer

10/24/98

Date

Judgment-Page 2 of 9

DEFENDANT: **KENNEDY NIJMEH**
CASE NUMBER: **5:96CR20155-005**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **60 month(s)** .

* * * *

Judgment-Page 3 of 9

DEFENDANT: **KENNEDY NIJMEH**
CASE NUMBER: **5:96CR20155-005**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s) .

* * * *

Judgment-Page 5 of 9

DEFENDANT: **KENNEDY NIJMEH**
CASE NUMBER: **5:96CR20155-005**

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$156,107.46

* * * *

DEFENDANT: **KENNEDY NIJMEH**
CASE NUMBER: **5:96CR20155-005**

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

* * *

Guideline Range Determined by the Court:

Total Offense Level: **19**
Criminal History Category: **I**
Imprisonment Range: **30 to 37 MONTHS**
Supervised Release Range: **2 to 3 YEARS**
Fine Range: **$ 6,000.00 to $ 60,000.00**

X Fine waived or below the guideline range because of the inability to pay.

Total Amount of Restitution: **$ 156,107.46**

* * *

X The sentence departs from the guideline range:

___ upon motion of the goverment, as a result of defendant's substantial assistance.

X for the following specific reason(s):

See Additional Reasons for Departure From the Guideline Range-Page 9

DEFENDANT: **KENNEDY NIJMEH**
CASE NUMBER: **5:96CR20155-005**

ADDITIONAL REASONS FOR DEPARTURE FROM THE GUIDELINE RANGE

The Court finds that the Guideline range does not adequately reflect the seriousness of the defendant's behavior. The Court finds by a preponderance of the evidence that the offense of conviction was committed in an effort to conceal proceeds derived by the defendant from major drug trafficking activities carried on by him. Although the Court does not believe that it is necessary to base its finding on a higher standard of proof, the Court finds by clear and convincing evidence that at times relevant to the bankruptcy petition, the defendant had substantial money and property derived from drug trafficking activities, which could have disqualified him as a person who was insolvent or as one incapable of paying his debts as they became due and that the petition was filed to conceal those proceeds and to further the defendant's drug trafficking. Accordingly, the Court departs upwardly to a sentence of 60 months, pursuant to USSG sections 2F1.1 and 5k2.0 [sic]. The Court chooses 60 months because it is the statutory maximum sentence for the offense of conviction. The court [sic] finds that the conduct and character of the defendant and the circumstances of the commission of the offense of conviction deserves [sic] the highest punishment allowable by law for the offense of conviction.

APPENDIX C

NOT FOR PUBLICATION

FILED
FEB 25 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 98-10477
v.	)	D.C. No. CR-96-20155-5-JW
KENNEDY NIJMEH, Defendant-Appellant.	)	
	)	ORDER

BEFORE: BROWNING, RYMER, and KLEINFELD, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed.R.App.P.35(b).

The petition for rehearing and petition for rehearing en banc is DENIED.